JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 579

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants*.

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Southern Railway Company and The Cincinnati, New Orleans and Texas Pacific Railway Company, appellants, submit this statement, pursuant to Rules 13 and 15 of the Supreme Court of the United States, as revised, to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Virginia is not yet reported. A copy is attached as Appendix A. The decision of the Interstate Commerce Commission (Division 2) is

reported in 298 I.C.C. 439, and a copy is attached hereto as Appendix B. Also attached, as Appendix C, is copy of the order of the Commission, dated May 4, 1956, made pursuant to the Commission's decision.

The District Court entered no findings of fact or conclusions of law apart from its opinion.

JURISDICTION

This suit was brought by appellants under 28 U.S.C 1336 to set aside in part an order of the Interstate Commerce Commission. Trial was held before a three-judge Court convened under 28 U.S.C. 2284 and 2325. The judgment of the District Court dismissing the complaint was entered on July 12, 1957, and notice of appeal was filed in that Court by appellants on August 29, 1957.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Thompson v. United States,* 343 U.S. 549, 554 (1952) and *Dixie Carriers* v. *United States,* 351 U.S. 56, 58 (1956).

QUESTIONS PRESENTED

The questions presented relate to that part of the Commission's order of May 4, 1956 (See third ordering paragraph in No. 31737, Appendix C),* requiring The

* This paragraph reads as follows:

"*It is further ordered,* That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner pre-

Cincinnati, New Orleans and Texas Pacific Railway Company (CNO&TP), an affiliate of Southern Railway Company (Southern), to establish reciprocal switching on all traffic between connections with other railroads at Chattanooga, Tenn., on the one hand, and industries in Boyce, Tenn., on the other. They arise from a decision of the Interstate Commerce Commission (Division 2) of that date (set forth in Appendix B), reconsideration of which was denied by an order of the Commission, dated October 1, 1956. That decision was made in a consolidated proceeding involving the prescription of rates on rutile ore from South Atlantic and Gulf ports to Chattanooga and Boyce, Tenn. (such prescription of rates not being attacked by appellants), and a requirement, sought by complaint of Cramet, Incorporated, that CNO&TP perform reciprocal switching between points of connection with other railroads in Chattanooga, on the one hand, and industries on its track known as the River track in Boyce beyond the Chattanooga city limits, on the other hand. The reciprocal switching requirement is the only part of the order challenged by appellants in its complaint in the Court below and on appeal to this Court.

The basic question is whether the Commission and the lower Court have misconstrued the Interstate Commerce Act, particularly sections 1 and 15(4), in hold-

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scribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn., to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga."

ing that it was within the Commission's authority to require reciprocal switching as just described and whether its requirement is adequately supported by findings of fact and evidence in support thereof.

Appellants rely upon the questions set forth in their notice of appeal. These questions may be restated and condensed as follows:

(1) Was it error of law for the Court and the Commission to hold that the Commission had authority, without complying with the short-hauling limitations of section 15(4) of the Interstate Commerce Act (49 U.S.C. 15(4)), to require CNO&TP, a Southern Railway System line, to perform the switching of *all* carload traffic from physical connections with other railroads in Chattanooga, Tenn., over its line to industries on its River track in Boyce, Tenn., beyond the Chattanooga city limits, and in the reverse direction, when such haul would be performed by the CNO&TP as merely the switching *agent* for such other line-haul carrier and CNO&TP would be deprived of its haul as a *principal* line-haul carrier, and thus be short hauled, under existing joint through rates in which it participates as an independent carrier and under which it is entitled to divisions?

(2) Did the Court and the Commission err in disregarding the fact that on June 23, 1954, prior to the proceeding here involved, reciprocal switching had by proper tariffs actually been cancelled over the CNO&TP line between connections with other railroads and industries on the River track in Boyce on all carload traffic and that the only routes to or from such industries were those over which CNO&TP was a carrier in its own right under joint rates participated in by it and was entitled to its haul between such points un-

less lawfully required pursuant to the short-hauling provisions of section 15(4) to surrender such haul?

(3) Did the Court misconstrue the statute in assuming that there was *suspension* by the Commission of cancellation of reciprocal switching provided for in the CNO&TP tariff in respect to industries in Boyce and that the burden of proof was, therefore, upon appellants to justify such cancellation, when actual cancellation had already been effected on June 23, 1954, of reciprocal switching on *all carload traffic* not only *to* but *from* such industries?

(4) Was it error of law for the Court, in the absence of any findings by the Commission of unlawful discrimination or undue preference or prejudice, or of higher rates to or from Boyce than to or from Chattanooga, to hold that the Commission's order could be sustained under section 1 of the Interstate Commerce Act, or any other section thereof, in requiring CNO&TP to convert itself from an independent carrier performing a haul between points of connection with other carriers in Chattanooga and industries on the River track in Boyce to a mere switching agent for such other carriers which would themselves perform the haul through such agency?

(5) Were the Commission's ultimate findings and order requiring reciprocal switching adequately sustained by either the findings in the report or evidence in the record and was the Court in error in holding that the findings and evidence were sufficient, or instead were they arbitrary, unreasonable, and contrary to statutory standards in violation of the due process clause of the Fifth Amendment to the Constitution of the United States?

STATUTE INVOLVED

The sections of the Interstate Commerce Act pertinent here are section 1 (4) and (5) (49 U.S.C. 1 (4) and (5)) with respect to the duty of common carriers by railroad to establish reasonable through routes and to charge just and reasonable rates, section 3(5) setting forth findings necessary to authorize the Commission to force one carrier to permit use of its terminal facilities by another carrier, section 15(3) vesting the Commission with power to require the establishment of through routes and joint rates, section 15(4) providing for protection against short-hauling, and section 15(7) authorizing the Commission to suspend tariffs prior to the effective date thereof. Pertinent portions of these sections are set forth in Appendix D.

For convenience, the short-hauling restrictions in section 15(4) are here set forth as follows:

> "Sec. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject

to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

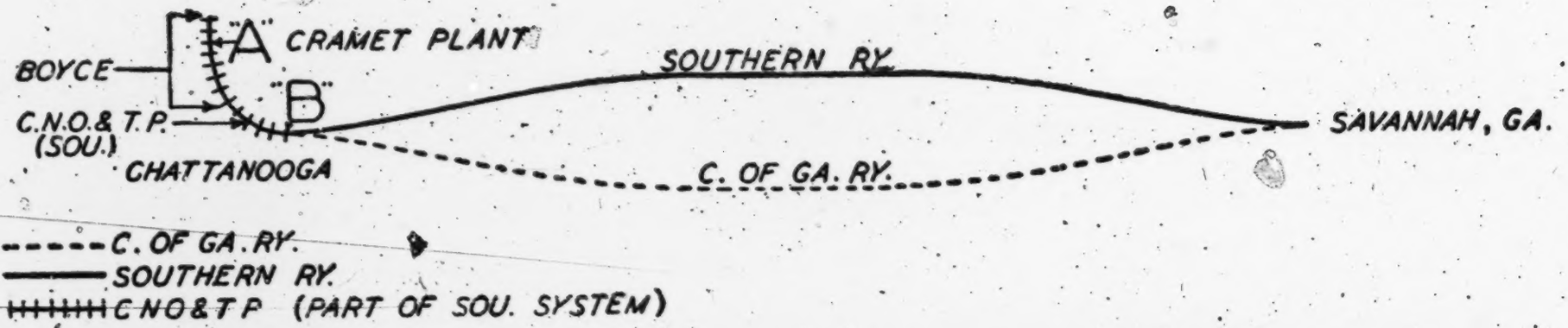
STATEMENT

The lower Court correctly said that in this case "we are concerned solely with reciprocal switching" (Appendix A, p. 3a). This issue, as the Commission's report shows, was raised by complaint filed by Cramet, Inc., on February 24, 1955, in No. 31737 with the Interstate Commerce Commission. This company has a plant located on what is known as the River track of the CNO&TP in Boyce, Tenn., beyond the city limits of Chattanooga, Tenn. The complaint alleged in substance that CNO&TP by tariff effective June 23, 1954, had discontinued reciprocal switching between connections with other railroads in Chattanooga and Cramet's plant on the CNO&TP line in Boyce; that such action was unjust and unreasonable in violation of section 1 and unduly prejudicial in violation of section 3 of the Interstate Commerce Act and requested the Commission to require defendants (appellants here) to provide for the switching of traffic at a switching charge between Boyce and the points of interchange with connecting lines at Chattanooga in respect to all carload traffic and to provide by absorption of the switching charge of CNO&TP for such service at rates the same as those to and from Chattanooga. (Appendix B, pages 440, 441)

The complaint also attacked the class rates then applicable on rutile ore from South Atlantic and Gulf ports to Boyce as violative of sections 1 and 3 of the Act. The Commission has prescribed reduced rates on this commodity the same to Boyce as to Chattanooga (Appendix C, p. 22a). This phase of the case, as previously noted, is not here involved.

In the proceeding before it, the Commission consolidated with Cramet's complaint in No. 31737 a complaint of the Central of Georgia Railway Company, which was supported by certain other carriers, and was directed primarily to proposed restriction by appellants of routing of rutile ore via Southern lines to Boyce. The Commission also included in the proceeding I. & S. docket No. 6284, in which rates on rutile ore proposed by appellants with certain routing restrictions had been suspended for investigation. In neither of the latter dockets (No. 31677 and I. & S. 6284) was there a request for reciprocal switching, the sole issue here.

Location of Boyce industries. The Cramet plant and plants of several other industries are located on the River track of the CNO&TP in Boyce extending from its main line beyond the city limits of Chattanooga and are indicated in the diagram shown on page 9. For convenience, the letter "A" represents the location of the Cramet plant and the letter "B" the point of interchange with another line-haul carrier, in Chattanooga, namely, the Central of Georgia. The point of interchange may be taken as illustrative of the situation as to the other railroads in Chattanooga, not counting Southern System lines. These other lines are the Nashville, Chattanooga & St. Louis Railway Company, and the Tennessee, Alabama & Georgia Railway Company.



Existing joint rate, C. of Ga. and CNO&TP, from Savannah to Boyce via C. of Ga., from Savannah to Chattanooga, thence CNO&TP to Cramet plant in Boyce. CNO&TP receives division of joint rate as *independent* connecting carrier.

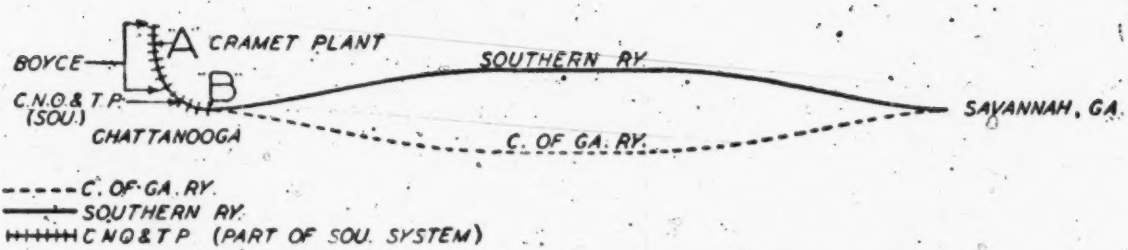
Reciprocal switching required by Commission:

C. of Ga. rate would apply to shipment from Savannah to Cramet plant in Boyce, being the same in amount as the joint rate.

CNO&TP would be required to switch from Chattanooga to Cramet as *agent* for C. of Ga., receiving only switching compensation.

CNO&TP would be compelled to relinquish haul in its own right from Chattanooga to Cramet, and act merely as involuntary *agent* for C. of Ga.

Prior to June 23, 1954, the industries on the River track in Boyce were in the Chattanooga reciprocal switching district. At that time the plant of Cramet was in the early stages of construction. Its location is



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Prior to June 23, 1954, the industries on the River track in Boyce were in the Chattanooga reciprocal switching district. At that time the plant of Cramet was in the early stages of construction. Its location is indicated by the letter "A". The situation then was, for example, that if a carload of traffic moved inbound to the Cramet plant on the River track from Savannah, Ga., it was hauled by the Central of Georgia to Chattanooga, where the car was turned over to the CNO&TP at "B" for further movement under a voluntary switching arrangement, to the Cramet plant at "A". The distance from "B" to "A" is approximately 3 miles, and to the end of the River track about 3½ miles (Exs. 8 and 20). CNO&TP acted as switching agent for the Central of Georgia in performing the service between "B" and "A" over its own line and made a switching charge against the Central of Georgia for the service, such charge being absorbed by the latter. The effect was that the rate of the Central of Georgia applied from Savannah to the Cramet plant in Boyce.

The CNO&TP was not a participating carrier in such rate and was not entitled to a division thereof but received merely payment of a lower switching charge from the latter. On outbound shipments, CNO&TP was not the bill of lading carrier and did not participate in the rate of the principal carrier, for example, Central of Georgia, which made out the bill of lading in its own name (R. 207).

Reciprocal switching to and from Boyce industries was cancelled by tariff, effective June 23, 1954. Under this tariff, CNO&TP no longer switched for the Central of Georgia (or other line-haul carrier) as agent but performed the haul from "B" to "A" as an independent carrier under existing joint through rates with such other carrier (R. 102, 106, Exs. 5 and 12).

Under the provisions of section 15(7) of the Act, the Commission is vested with power on its own motion or on protest, to suspend tariffs filed with it *prior* to their effective date. This tariff was protested prior to its effective date (R. 205, 239, 311) but was not suspended. It, therefore, became effective on that date. Its provisions are set forth as an appendix to the Commission's report (Appendix B, p. 449).

The tariff provides that "the CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn., except as provided in paragraph 2 of this item". Such exception is applicable only where the Chattanooga rates are different from the Boyce rates, a situation practically non-existent (R. 25, 109, 123, 210, 240, 351). The actual effect of the tariff, therefore, was to cancel reciprocal switching. This appears to be recognized by the Court, which said (Appendix A, p. 4a):

> "In reality, the rates from or to Boyce and Chattanooga are so seldom different that the effect of the

action [of June 23, 1954] was that on competitive traffic destined to or from Boyce, CNO&TP refused to switch."

A similar conclusion was reached by the Commission.*

It is important to note that cancellation of reciprocal switching was an accomplished fact on June 23, 1954. This was approximately eight months prior to the complaint of Cramet in the present proceeding.

(a) The Court erroneously assumed that the tariff of June 23, 1954, cancelling reciprocal switching was under suspension.

A basic error, appellants believe, in the Court's consideration of the short-hauling question presented in this case under section 15(3) and (4) of the Act is in its failure to recognize that the CNO&TP tariff of June 23, 1954, as of that date, cancelled and put an end to reciprocal switching by CNO&TP as *agent* for other railroad lines between Chattanooga and Boyce. The tariff substituted, for such voluntary agency relationship, participation by the CNO&TP as an *independent* carrier in the existing joint rates with other carriers under which it received divisions for its haul between connections with such carriers in Chattanooga and the Boyce industries on the River track.

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* The Commission said (p. 445):

"It appears that the result thereof [the June 23, 1954 tariff] is the division of charges from joint rates applicable to and from Boyce other than by the absorption of a switching charge. The only condition under which the traffic will be switched at a switching charge, * * * according to these provisions, is an absence of the same rates to or from both Boyce and Chattanooga. The evidence indicates that few, if any, rates to Boyce are not the same as those on like traffic to Chattanooga."

The following quotation from the Court's opinion indicates that it erroneously overlooked the finality of the June 23, 1954, tariff and assumed it to be under suspension, with the burden of proof cast upon appellants:

> "Secondly, historically, the record indicates that Boyce and Chattanooga were treated in all the tariffs identically until June 23, 1954. Thus it is to be borne in mind that the Commission is not now establishing a through route and joint rate under *Section 15(3), Title 49, U.S.C.* Upon the contrary, the action of plaintiffs, in effect, is the cancellation of an existing through route and joint rate without the consent of all carriers parties thereto or authorization by the Commission. The action on the part of plaintiffs having been *suspended by the Commission* for investigation, the burden is upon plaintiffs to show its action is consistent with the public interest. This they have not done. It follows that plaintiffs are not giving up any rights or privileges exercised prior to June 23, 1954. It also follows that the conclusion of this Court is that plaintiffs are not short hauled by the order of May 4, 1956, contrary to *Section 15(4), Title 49, U.S.C.*" (Emphasis supplied).

The error of the Court, it is believed, is apparent for the following, among other, reasons:

(1) As previously indicated the tariff of June 23, 1954, cancelling reciprocal switching actually became effective on that date and the Commission declined to suspend. The Commission has no power under the Act "to suspend the operation of a schedule [tariff] after it has gone into effect." *Proposed Schedules of Rates on Lumber*, 21 I.C.C. 16, and *Wickwire Steel Co.* v. *New York Central & H. R. R. Co.*, 27 I.C.C. 168, 169. If it should be argued that the Court in referring to suspension may have had in mind the suspended

rutile ore rates, this appears at odds with the Court's own language. Moreover, it is to be noted that the Commission's order requiring reciprocal switching is not limited to rutile ore but covers *all carload traffic*; both *inbound* and *outbound*. The suspended rutile ore rates were rates in which the CNO&TP was a publishing or participating carrier. The rates prescribed by the Commission on this commodity are joint rates in which CNO&TP is a participating carrier, and there was no proposal that the previously existing joint rate arrangement under class rates, with CNO&TP a participant, should be replaced by rates to be published by other carriers with CNO&TP not a participant in such rates but merely a switching agent under reciprocal switching arrangements.

(2) The Court states that "the action of plaintiffs, in effect, is the cancellation of an existing through route and joint rate without the consent of all carriers parties thereto or authorization by the Commission". This ignores the fact that the June 23, 1954, tariff did not require joint action with any other carrier to cancel reciprocal switching. It is well recognized that under reciprocal switching "the switching line is not a party to the joint rate, but is merely an agent of the line-haul carrier". *Automobiles to Southern Ports for Export,* 225 I.C.C. 225, 229. The carrier performing the switching can alone cancel the reciprocal switching arrangement. *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. Co.,* 229 I.C.C. 497, 498. Moreover, the reciprocal arrangement in the present case was a purely voluntary one.

(3) The Court overlooked that the CNO&TP having lawfully provided by its tariff of June 23, 1954, for cancellation of reciprocal switching and resulting participation under joint rates as an independent carrier

performing the haul between Chattanooga and Boyce, could not have this haul taken away by the order here involved requiring the CNO&TP to give up such haul. This would require CNO&TP to be short-hauled and to substitute, for its own haul, service by it as a mere switching agent for another carrier acting as principal and publishing the rates applicable to traffic to and from Boyce.

(4) Not being a suspension case as to reciprocal switching, there was no justification for assuming that the burden of proof was on appellants.

The Court, it is submitted thus misconstrued and erred in applying the provisions of section 15(3) and (4) and section 15(7) of the Act.

(b) The Court and the Commission misconstrued section 15(4) in assuming that the requirement of an agency relationship under reciprocal switching in lieu of service as a principal carrier does not involve short-hauling.

The Court adopts the Commission's view that short hauling is not here involved (Appendix A, p. 9a). This, it is believed, involves a misconstruction of section 15(3) and (4) and a misconception of the difference between the principal and agency relationships above pointed out.

It has long been recognized that under reciprocal switching the principal carrier, the line-haul carrier, publishes the rate, and the switching line does not join therein but performs the switching as the agent for the other line, receiving as compensation a separate switching charge published by it and paid by the other line. For example, in *Ezee Flow Corp.* v. *Illinois Central R. Co.*, 287 I.C.C. 281, involving alleged misrouting, the Commission pointed out (p. 284) that the

switching line, the Indiana Harbor Belt, "merely performed a switching movement within the Chicago switching district to its connection with the Illinois Central" and said:

> "The latter carrier [Illinois Central] performed the entire line-haul service from Chicago. The Illinois Central, therefore, was responsible as the initial carrier, the switching carrier having acted merely as its agent."

See also *Automobiles to Southern Ports for Export*, 225 I.C.C. 225, 229, supra, where it was held that "the switching line is not a party to the joint rate, but is merely an agent of the line-haul carrier".

Such agency relationship is recognized in *Missouri Pac. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U.S. 366 (1925). The switching carrier at destination was held to be merely an agent of the last line-haul carrier and, therefore, not liable for the loss incurred in the transportation. The Court said (p. 368-369):

> "The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad & Steamship Company as the initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. It employed the St. Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such."

In the present case, both the Court and the Commission, it is believed, misconstrued section 15(4) in failing to recognize the effect of the agency relationship, which would be brought about by the Commission's order. That order would require CNO&TP to act merely as *agent* for the principal carrier, for example, the Central of Georgia, or other carriers in performing service between Chattanooga and Boyce, and would compel CNO&TP to give up its own haul as an *independent carrier* in its own right under joint rates, thus losing its haul between Chattanooga and Boyce and its right to divisions under the joint rates instead of a lower switching charge. The deprivation of this haul would, in appellants' view, be nothing less than establishment of a new route in disregard of the short-hauling restrictions of section 15(4). Admittedly there has been no attempt to comply with those restrictions.

(c) The Court erroneously held that findings of the Commission and evidence in support thereof were sufficient to sustain the reciprocal switching order, although no unlawful discrimination was found and no legal injury shown.

In addition to the error above mentioned in misconstruing and misapplying the short-hauling provisions of section 15(3) and (4) of the Act and the suspension provisions of section 15(7), the Court, it is believed, erred in holding that the reciprocal switching order is sustained by proper findings and evidence in support thereof (Appendix A, pp. 6a, 7a).

The Commission's ultimate finding as to reciprocal switching, which is referred to by the Court, p. 5a, is:

> "In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a

> switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable." (p. 448)

Denial of reciprocal switching is thus found to be "unjust and unreasonable". There is no finding of unlawful discrimination or undue prejudice under section 3 or any other section of the Act.

The Commission found (p. 447), and the Court seemed to reach a similar conclusion (p. 6a), that—

> "This [proposed restriction of rutile ore to Southern's single-line route] would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga."

If this was intended by the Commission as a subsidiary or underlying finding in support of the reciprocal switching requirement, it completely fails of this purpose. The finding has reference to proposed rutile-ore rates restricted to apply over "single-line routes" of the Southern System. The railroad proposal was, for example, that rutile ore from Savannah to the Cramet plant at Boyce would be restricted to move only over the route of the Southern all the way from point of origin to the Cramet plant in Boyce. This proposal was suspended by the Commission. It concluded that such restriction should not be permitted and that other carriers should participate in routes to the Cramet plant. The Commission, therefore, in the part of its order not here attacked, prescribed lower rutile ore rates over routes which had previously existed. For example, a rate of $8.50 per ton was prescribed on this

commodity from Savannah to industries in Boyce, including the Cramet plant, such rate being applicable not only via the Southern System all the way but also over the route composed of the Central of Georgia from Savannah to Chattanooga and thence over the CNO& TP to the industries in Boyce. Before the suspension proceeding the CNO&TP participated in the joint rate from Savannah to the Cramet plant, receiving as an independent carrier a division thereof. Under the joint rates prescribed in this proceeding on rutile ore, CNO&TP will continue to act as an independent participating carrier and receive a division of the rate. Since the route will continue to be the same no question was raised by appellants in the present suit as to the establishment of a new route in respect to such joint rates on rutile ore or as to the application of the short-hauling provisions of section 15(4).

The reciprocal switching question presented in the present case is entirely different, and the above finding as to deprivation of "competitive service to and from Chattanooga" has no application. The reason is that the existence of joint rates not only on rutile ore but on all carload traffic to and from the Cramet plant or other Boyce industries, on the same level as the Southern System rates assures the free movement via either route to and from such industries, irrespective of reciprocal switching, which as previously indicated, was cancelled on June 23, 1954. It is also to be pointed out that unlike the joint rates on rutile ore which were prescribed over the same routes as those previously existing, with the CNO&TP a participant in each instance as an independent carrier, the part of the order here under attack requires CNO&TP to perform reciprocal switching, thus giving up its haul as an independent carrier on all carload traffic, including rutile ore, between Chattanooga and Boyce, and to assume

the involuntary role of a mere switching agent for the other carrier which itself would have the haul as principal. This, as noted above would result in short hauling CNO&TP without compliance with the restrictions in section 15(4) of the Act.

Moreover, the ultimate finding of unjustness and unreasonableness with respect to reciprocal switching, quoted above, apparently assumes a condition of higher rates via other lines after the cancellation of reciprocal switching on June 23, 1954, than if the traffic were handled by CNO&TP as a connecting carrier with such other carriers under joint rates. This overlooks the parity of the Chattanooga and Boyce rates.

Both the Court and the Commission, it is believed, erroneously failed to recognize their own findings, previously quoted, that the Boyce rates are the same as the Chattanooga rates. For example, the rate on a shipment from Savannah to Boyce over the single-line route of the Southern System was, and is, the same as the joint rate of the Central of Georgia and the CNO&TP, the haul of the Central of Georgia being from Savannah to Chattanooga and thence over the CNO&TP to the Cramet plant or other Boyce industries. This parity of rates is true as to all kinds of traffic and not merely as to rutile ore.

No injury to Cramet or other Boyce industries. In view of these undeniable facts as to parity of rates, there can be no rate injury. The reason is that Cramet and other Boyce industries will have the benefit of the same rates as industries within Chattanooga. Nor is there any showing or finding of service insufficiency or other injury. Cramet and other industries on the River track are local to the CNO&TP and the transportation between Chattanooga and those industries is performed by that carrier as an independent connect-

ing carrier under joint rates. The physical service would be the same between Chattanooga and the Boyce industries, and the shippers and receivers would pay the same total rate, whether the service would be under the existing joint rate arrangement or under reciprocal switching. There is no rate, service, or other injury as there was none in *Routing from or to Cantonment, Fla.*, 288 I.C.C. 708, 712.

The general rule is that reciprocal switching can be required against the will of the carrier involved only upon a showing of undue preference or prejudice under section 3 of the Act; that such showing must be not merely a difference in treatment but of injury to one shipper in relation to another and that the order must permit removal of the discrimination by affording the carrier the alternative of altering the treatment of either the one claimed to be prejudiced or the other claimed to be preferred or altering the treatment of both. See *Joseph A. Goddard Realty Co.* v. *New York C. & St. L. R. Co.*, 229 I.C.C. 497, 500, 501. No unlawful discrimination was there found nor a violation of section 1. As to the rule see also *Veenstra Lbr. & Supply Co.* v. *Chicago & N. W. Ry. Co.*, 279 I.C.C. 203, 208.

The Commission in its report in the present case cites *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 I.C.C. 505, but in that case, unlike the present one, an undue prejudice finding was made.

Both the Court and the Commission seem to be of the opinion that Cramet was adversely treated in respect to the location of its plant on the River track at Boyce rather than elsewhere, believing that it would have reciprocal switching.

As to this it is to be noted that counsel for Cramet frankly and fairly stated at the hearing (R. 238) "that

there is no charge of bad faith or fraud or misrepresentation or of dishonesty or any of that sort of thing."

CNO&TP in its tariff of June 22, 1954, which became effective after the Cramet plant was located on the River track, took pains to continue the rate parity which had existed under reciprocal switching. (R. 310) As already noted the Boyce rates were the same as the Chattanooga rates, and the tariff provided as a protection of rate equality that, if the rare instance should arise where rates were different, this carrier would perform reciprocal switching, thus guaranteeing rate parity.

The Boyce industries were thus protected by the tariff in the same manner as industries in North Chattanooga as to which reciprocal switching had previously been discontinued and a like tariff had been published and applied since 1939 (R. 317). It was shown that there are some 36 of such industries in North Chattanooga and none has complained (R. 317).

In this connection it is also to be noted, as recognized by the lower Court, that the Boyce area was pioneered by Southern and it alone extended its line into this area. It believes that it is entitled under the Interstate Commerce Act to protection from invasion by other carriers, unless upon proper showing, not present here, such action is demonstrated to be justified.

No finding that compulsory use of CNO&TP is justified. Congress has provided in section 3(5) of the Act that involuntary use of the terminal facilities of one carrier by another may be required by the Commission but only upon the making of certain findings. In certain cases upon appropriate findings the Commission has required reciprocal switching under this section. *Hastings Commercial Club* v. *C., M. & St. P. Ry. Co.*, 69 I.C.C. 489; *Chicago & N. W. Ry. Co.* v. *Ann*

Arbor R. Co., 263 I.C.C. 287, 296; and *City of Milwaukee* v. *Chicago & N. Y. R. Co.*, 283 I.C.C. 311, 314. But no such findings have been made in the present case, and the Commission has not even purported to act under section 3(5). Nor have any of the parties sought to invoke the Commission's powers under this section.

The Commission is in substance seeking by its order to require the use of the CNO&TP terminal facilities in the Boyce area by other railroads, when Congress by section 3(5) has carefully shown its purpose not to permit such compulsory use, unless the Commission "finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier [CNO&TP] by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business". The Commission is further required to fix "compensation" for such use, to be "ascertained on the principle controlling compensation in condemnation proceedings" (See Appendix D, p. 24a).

The safeguards thus provided by statute against invasion of a carrier's terminal facilities by an order requiring involuntary use thereof should not be permitted, when as here there are completely absent any of the findings required by Congress.

The lower Court erroneously assumed that the Commission's order is sustained by ample findings. This was fatal error.

The Court in numerous cases has invalidated orders of the Commission because of the latter's failure to set forth findings which would afford the Court basis for concluding that the Commission had not exceeded its permissible judgment on the factors underlying the ultimate issues. See *State of Florida* v. *United States*, 282 U.S. 194; *United States* v. *Baltimore & O. R. Co.*,

293 U.S. 454; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U.S. 193; *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475; *City of Yonkers* v. *United States,* 320 U.S. 685; *Eastern-Central M. C. Ass'n* v. *United States,* 321 U.S. 194; *State of North Carolina* v. *United States,* 325 U.S. 507; and *State of Alabama* v. *United States,* 325 U.S. 535.

QUESTIONS ARE SUBSTANTIAL AND IMPORTANT.

As previously pointed out, appellants believe that the lower Court and the Commission have misconstrued and misapplied section 15(3) and (4) of the Interstate Commerce Act in holding that the short-hauling restrictions specifically provided for in section 15(4) could be ignored.

The right of railroads not to be short hauled, unless upon the showing provided for in section 15(4), which admittedly is not attempted here, is an extremely important one and has been recognized by Congress and this Court over a period of many years.

In striking down an order of the Commission running counter to the short-hauling provisions of section 15, this Court in *Thompson* v. *United States,* 343 U.S. 549, showed the importance of compliance with the restrictions in that section. Later in *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.,* 351 U.S. 321 (1956) the Court in referring to the *Thompson case,* again stressed the importance of such compliance, saying (p. 327):

> "We there emphasized the purpose of section 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline 'short-hauls' *without faithful observance of restrictive conditions imposed by that section.*" (Emphasis supplied)

Preservation of carriers' rights under the short-hauling provisions of the Act and recognition of their rights in their own terminals make it highly important to the carriers here involved, to shippers, and to the public to have an authoritative interpretation of the statute and a determination of the limits of the Commission's authority, which it is believed, has here been exceeded.

The Commission in requiring the CNO&TP, one of appellants, to perform the reciprocal switching from the lines of other carriers at Chattanooga to and from industries in the Boyce area as a mere agent for such other carriers strips the CNO&TP of its haul as an independent carrier between these points under joint rates with the other carriers, and thus requires short hauling without compliance with the provisions of section 15(4) of the Act. The effect of this is to require CNO&TP to accept a low switching charge for the service it performs as an agent instead of higher line-haul divisions it would receive as a principal line-haul carrier.

The Commission thus by-passes the protective, short-hauling provisions of section 15(4) and ignores the requirements which must be met under section 3(5) to justify ordering involuntary use of CNO&TP terminal facilities by other carriers. In addition the suspension provisions of section 15(7) are misconstrued.

If, contrary to appellants' view, there should be any real need for reciprocal switching required by the Commission's order, such need can be tested under the provisions of section 15(4) which permits the Commission to require short hauling on a showing that the carrier's existing line is unduly long and the proposed line is necessary to provide adequate and more efficient service. But these provisions have been held by the

lower Court and the Commission to be inapplicable here. Moreover, the tests under section 3(5) are available but have been ignored.

Primarily a question of statutory construction is involved as to facts concerning which there should be little, if any, real dispute. Compare the *Dixie Carriers case,* 351 U.S. 56, supra, where an order of the Commission was set aside for failure to comply with the statute. But in addition to such misconstruction of the Act, it is believed that the Commission has exceeded its authority in requiring reciprocal switching without the necessary findings and evidence in support thereof.

Appellants, therefore, respectfully submit that the jurisdiction of this Court is shown, that the questions presented are substantial and highly important, that the case should be heard by the Court on briefs and oral argument, that the judgment of the lower Court should be reversed and that the portion of the Commission's order here under attack should be set aside.

Respectfully submitted,

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PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of October, 1957, I served copies of the foregoing statement on the several parties hereto, as follows:

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